

FOSS NIRSYSTEMS, INC.

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IN THE

vs.

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MARYLAND TAX COURT

COMPTROLLER OF THE TREASURY

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No. 98-SU-OO-0272

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MEMORANDUM AND ORDER

Foss NIRSystems, Inc. (Foss), Petitioner, has appealed the Comptroller's assessments of sales and use tax against Foss for inventory used to demonstrate the Petitioner's product to potential customers. The Comptroller contends that Petitioner's inventory held for demonstration is not held solely for resale and has been used by Foss for certain other business purposes.

Foss is a corporation which designs, manufactures, sell, installs and maintains near infrared spectrographic analyzers, also known as spectrophotometers, used for the analysis of pharmaceutical, food and agricultural products. Foss markets its products by offering demonstrations of its spectrophotometers to potential customers to prove the applicability of its products and to assist the customer in selecting the model most appropriate for its intended use. Foss obtains samples of the potential customer's products for analysis and/or offers demonstrations of the spectrophotometers at a trade show or at the customer's place of business. Foss demonstrates its products at the potential customer's place of business and often the demonstrations are done outside of the State of Maryland. The manufacturing of the machines occurs in Maryland, although

Foss has no warehouse facilities. However, the executive offices of Foss are located in Maryland. Foss does not demonstrate its products "off the shelf" and often the demonstration is necessary to prove to the customer that Foss's product and technology will work and to sell a new piece of equipment. Each system sold is customized for the individual customer by using the customer samples which are typically sent to Foss's headquarters in Silver Spring, Maryland and analyzed on a number of machines belonging to the Petitioner. Approximately 150 on-site demonstrations are performed every year and approximately 70 demonstrations are performed in Silver Spring each year. Typically, after the use of the machine for the demonstration, the machine is returned to the location within the company from which it was obtained. Usually it is brought back to the Silver Spring facility to be recalibrated before it is used again in another demonstration. Occasionally, the customer requests the right to purchase the machine that was used in the demonstration at a discounted price. Foss also uses its demonstration inventory as displays and demonstrations at trade shows, conventions, as well as university and educational institutions for extended periods of time. These additional uses are for the purpose creating future markets for the products of the Petitioner. It is important to note that of the 365 individual items in the demonstration inventory provided by Foss to the Auditor, 275 of the items have been in demonstration inventory for over one year.

The Comptroller issued a use tax liability against Foss's demonstration inventory and contended that the basis for such assessment was that the items used by the Petitioner were for multiple purposes and not held solely for resale. Maryland Code

Annotated Tax-General Section 11-102(a)(3) provides that a tax is imposed on the use of tangible personal property. Tax-General Section 11-101(1) defines use as an exercise of a right or power to use, consume, process or store tangible personal property. Richard Glacken, Chief Auditor for the Comptroller of the Treasury, testified that the long standing policy of the Comptroller's Office had been that any tangible personal property acquired through a sale for use, not held solely for resale, is subject to the use tax and thus does not fall under the exclusion in Tax-General Section 11-101(1)(3)(ii)(2). The Comptroller contends that Foss purchases its materials for demonstration inventory for the purpose of demonstrations, training and displays, in addition to resale, and thus Foss is not entitled to avail itself of the resale exclusion with respect to the use tax due on these purchases.

We agree with the Comptroller that Foss's demonstration inventory was used by Foss for demonstrations to prove that the product was capable of being adapted to the customer's particular applications or use. The primary purpose of the demonstration was not to sell a specific item of equipment being demonstrated. Often the inventory was used for training or for displays and demonstrations at trade shows and conventions. In addition, the inventory was provided to universities and colleges for a number of years in order to develop new markets for the sale of Foss's equipment. Although the demonstration inventory may have been available for sale, the primary purpose of the demonstration inventory was for a purpose other than resale. The demonstration inventory was in fact being used and that use was not incidental. Approximately three quarters of the demonstration inventory provided to the Auditor had been used as demonstration

equipment for over one year. The 70 feasibility studies performed each year, as well as the 150 on-site consumer customer demonstrations performed every year, together with the training sessions held 3 out of 4 weeks every month indicate an actual use of the demonstration inventory for business purposes and not for the sale of a particular piece of equipment.

Foss further contends that even if the demonstration inventory is subject to tax, the use of that inventory for taxation purposes did not occur in Maryland. The Court disagrees based on the evidence in this case. The initial manufacturing of the equipment, as well as the exercise of power over that piece of equipment was exercised by Foss's employees in Silver Spring, Maryland. Although the equipment of Foss may be used in multiple locations, the demonstration lists indicate that often an item of equipment left Maryland for demonstration purposes, but later said equipment was ultimately used in Maryland after being located outside of Maryland. The mere fact that the actual demonstration of the equipment did not occur in Maryland does not obviate the fact that the *for resale* status was terminated at the time the item was removed from inventory by executives in Silver Spring, Maryland. It is clear that the right or power to use, consume, possess and store the Petitioner's demonstration inventory was exercised by the taxpayer in Maryland.

In conclusion, it is this **15th** day of **March**, 2001,
by the Maryland Tax Court ORDERED that the assessment in the amount of \$72,664.24,
plus interest, as use tax on the Petitioner-s demonstration inventory be and the same is
hereby **AFFIRMED**.

Judge